IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 199

GEORGE B. HARRIS,

Petitioner,

—v.—

LOUIS NELSON,

Respondent.

BRIEF *AMICI CURIAE* OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE NATIONAL OFFICE FOR THE RIGHTS OF THE INDIGENT

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL MELTSNER
JACK HIMMELSTEIN
10 Columbus Circle
New York, New York 10019

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pa. 19104

Attorneys for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent

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Statement of Interest of the *Amici*

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York court, authorizing the organization to serve as a legal aid society. The N.A.A.C.P. Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is sup-

ported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts, in matters resulting in decisions that have had a profoundly reformative effect upon the administration of criminal justice.

A central purpose of the Fund is the legal eradication of practices in our society that bear with discriminatory harshness upon Negroes and upon the poor, deprived, and friendless, who too often are Negroes. In order more effectively to achieve this purpose, the LDF in 1965 established as a separate corporation movant National Office for the Rights of the Indigent (NORI), which organization has joined in the filing of this brief. This organization, whose income is provided initially by a grant from the Ford Foundation, has among its objectives the provision of legal representation to the poor in individual cases and the presentation to appellate courts of arguments for changes and developments in legal doctrine which unjustly affect the poor.

LDF and NORI attorneys have represented many prisoners in petitions for writs of habeas corpus in the federal courts, and *amici* are therefore acutely aware of the essential role of habeas corpus in the criminal process. Habeas corpus is clearly one of the most vital remedies for the protection of constitutional rights, and resolution of the issue raised in this case will determine whether habeas corpus is to be an effective remedy.

The parties have consented to the filing of an *amicus curiae* brief by the N.A.A.C.P. Legal Defense and Educational Fund, Inc. Copies of their letters of consent will be submitted to the Clerk with this brief.

ARGUMENT

Introduction and Summary

In this case, a panel of the Court of Appeals for the Ninth Circuit issued the prerogative writ of mandamus against the Chief Judge of the United States District Court for the Northern District of California on the theory that a federal district judge entertaining a petition for a writ of habeas corpus entirely lacks power to permit the use of interrogatories for discovery purposes. Specifically, the Court of Appeals held that written interrogatories propounded by an imprisoned petitioner to a respondent custodian are not authorized in federal habeas corpus proceedings either by statute or by Rules 33 and 81(a)(2) of the Federal Rules of Civil Procedure, hence that a district court may not lawfully allow such interrogatories.

The opinion of the Court of Appeals does not discuss the question whether, if interrogatories in habeas corpus proceedings are not authorized by the applicable federal statutes and rules, a district court could nevertheless approve their use, in an appropriate case, in the exercise of its inherent power to manage proceedings before it and to fashion efficient and practicable forms of procedure in habeas corpus matters. But the issuance of a mandamus plainly implies that no source of authority legally available to the district judge was deemed sufficient to empower him to order a party to respond to discovery interrogatories in any habeas case.

Such a decision has grave importance beyond the disallowance of interrogatories in this particular prisoner's case. The Ninth Circuit bases its result upon its construction of Federal Civil Rule 81(a)(2), the rule which governs

the applicability of the Rules of Civil Procedure generally in habeas corpus proceedings. The effect of its construction is to deny the federal habeas courts the use of any of the modern procedures prescribed by the Civil Rules, unless it can be shown either that the particular procedure is expressly authorized by statute or that it was in use in habeas corpus practice prior to 1938 (the year of initial promulgation of the Rules), and that such habeas corpus practice had, by 1938, developed identically to that in ordinary civil actions. *Amici* contend that this reading of Rule 81(a)(2) is unduly restrictive and would seriously impair the administration of the federal habeas corpus jurisdiction.

We show first, in Part I *infra*, the onerous consequences of the Ninth Circuit's ruling for habeas corpus litigants and for the federal district courts which bear the greatest share of the burden of implementing the Great Writ. In Part II, we show that these consequences are as unnecessary as they are undesirable, since nothing in law compels the Ninth Circuit's treatment of Rule 81(a)(2) either as excluding the direct application of appropriate Federal Civil Rules in habeas corpus, or as hobbling the power of a district judge to adopt appropriate provisions of the Rules as the procedures for administering his habeas corpus jurisdiction.

I.

The Federal Habeas Corpus Jurisdiction Should Be Administered by Modern, Efficient and Evolving Procedures Which Effectuate Its Purpose—the Vindication of the Right Against Unconstitutional Restraint.

We begin our submission from premises which we think are indisputable, and which we therefore state summarily.

First, the business of the federal habeas corpus courts has multiplied in the past few years, and is now considerable. It is likely to continue to multiply in the immediate future. This development is the product of a number of factors. It responds to the evolution of substantive constitutional doctrine by this Court, which has increasingly civilized the administration of American criminal justice by the application to the States of Due Process and Bill of Rights guarantees for the criminal accused.[1] It reflects also a growth in the conception of the office of the federal writ of habeas corpus, in several related aspects. There has been a progressive broadening of the categories of illegal restraint against which the Great Writ affords relief.[2] There has been a broadening of the sorts of federal rights which the writ lies to secure, so

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[1] E.g., *Miller* v. *Pate*, 386 U.S. 1 (1967); *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966); *Pate* v. *Robinson*, 383 U.S. 375 (1966); *Specht* v. *Patterson*, 386 U.S. 605 (1967); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Duncan* v. *Louisiana*, 391 U.S. 145 (1968).

[2] It is now available, for example, to parolees, *Jones* v. *Cunningham*, 371 U.S. 236 (1963), to prisoners challenging a commitment under circumstances where the vindication of their constitutional claims will not result in immediate release from incarceration, *Peyton* v. *Rowe*, 391 U.S. 54 (1968), and notwithstanding a prisoner's incarceration terminates by reason of the expiration of his sentence before final adjudication of his habeas application, *Carafas* v. *LaVallee*, 391 U.S. 234 (1968).

that, far from relieving (as once it did) only against "jurisdictional" defects in the conviction court, habeas corpus is now available for the vindication of any federal constitutional violation occurring in a prisoner's trial or appeal.[3] And, finally, there has been a progressive appreciation of the function of federal habeas corpus as an independent forum for adjudication by the federal judiciary of a state prisoner's federal claims—a function which requires that the federal judges make their own determination of the validity of those claims, whatever view the state courts may earlier have pronounced upon them.[4]

Second, this development of the federal writ has involved not merely a numerical increase in the volume of cases processed, but also a shift in the subject matter of the bulk of cases, entailing a redirection of the kind of processing which the cases must receive. Thirty years ago,

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[3] This Court's early decisions, in cases involving both federal and state prisoners, held that the only claims which could be raised on habeas corpus were those that went to the jurisdiction of the convicting court. *Ex parte Watkins*, 3 Pet. 193 (1830) (federal prisoner); *Ex parte Parks*, 93 U.S. 18 (1876) (federal prisoner); *Ex parte Bigelow*, 113 U.S. 328 (1885) (federal prisoner); *In re Wood*, 140 U.S. 278 (1891) (state prisoner); *Whitten* v. *Tomlinson*, 160 U.S. 231 (1895) (alternative ground) (state prisoner); *Frank* v. *Mangum*, 237 U.S. 309 (1915) (state prisoner). The "jurisdictional" concept was first stretched, in both classes of cases, by the fiction of calling grave constitutional defects "jurisdictional." *Ex parte Lange*, 18 Wall. 163 (1873) (federal prisoner); *In re Snow*, 120 U.S. 274 (1887) (federal prisoner); *Ex parte Bain*, 121 U.S. 1 (1887) (federal prisoner); *Ex parte Siebold*, 100 U.S. 371 (1879) (federal prisoner); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938); *Medley, Petitioner*, 134 U.S. 160 (1890) (state prisoner). Later, following the *Johnson* v. *Zerbst* decision, the fiction was abandoned, and it was recognized that habeas corpus (or, in the case of federal prisoners, its statutory counterpart, 28 U.S.C. §2255) was available to raise any claim of fundamental constitutional error in the conviction process. *Waley* v. *Johnston*, 316 U.S. 101 (1942) (federal prisoner); *Fay* v. *Noia*, 372 U.S. 391 (1963) (state prisoner).

[4] *Ex parte Hawk*, 321 U.S. 114 (1944); *Brown* v. *Allen*, 344 U.S. 443 (1953); *Townsend* v. *Sain*, 372 U.S. 293 (1963).

for example, evidentiary hearings in habeas corpus were exceedingly rare, because the "jurisdictional" issues which were then thought to be the unique province of habeas corpus did not often give rise to factual disputes; because, if they did, the state courts were thought to be the only forum empowered to resolve them, provided that the state procedures for their resolution themselves complied with due process of law;[5] and because, as a practical matter, the substantive federal constitutional protections available to a state prisoner and likely to give rise to evidential controversies, were rudimentary. Today, " 'it is the typical, not the rare case in which constitutional claims turn upon the resolution of contested factual issues' " requiring an evidentiary hearing in the federal habeas corpus forum. *Townsend* v. *Sain,* 372 U.S. 293, 312 (1963). In this aspect, as in others, the new functions which preoccupy federal habeas corpus, in these late 1960's, require sorts of inquiries and procedures different, in the vast majority of cases, than those common in writ proceedings a third or even a quarter of a century ago.

Third, the federal statutes specifically governing procedure in habeas corpus matters are almost entirely silent on all of the details of practice which are vitally important to the efficient, routine processing of large numbers of cases making new demands upon, and requiring new sorts of factual and legal inquiry by, the federal trial courts. The sections of the Judicial Code that are found between 28 U.S.C. §2241 and 28 U.S.C. §2254 may be searched in vain for provisions governing the principal aspects of pretrial and trial procedure, of the sort that occupy the bulk of the Federal Civil Rules and most modern State procedural codes. These federal statutes, which largely codify nineteenth century practice and the residues of nine-

[5] See *Frank* v. *Mangum,* 237 U.S. 309 (1915), effectively overruled by *Moore* v. *Dempsey,* 261 U.S. 86 (1923).

teenth century habeas corpus legislation, are obsessed with pleading—as was appropriate when trials in habeas corpus were infrequent. They are skeletal, at best, on matters relating to the preparation and presentation of evidentiary matters at a hearing. And so they fail, by a wide margin, to respond to the modern-day needs of the federal habeas corpus courts.

From these premises emerges the problem with which the present case is concerned. The lower federal courts, confronted with an application for a writ of habeas corpus that cannot be disposed of on its face, must find or devise some form of procedure or practice, not provided for by statute, that will enable them properly and efficiently to handle the case. Federal Civil Rule 81(a)(2) provides, in pertinent part:

> "These rules are applicable to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions." [6]

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[6] The language quoted in the text is the product of the recent revision of the Federal Civil Rules, designed to integrate those rules with the newly published Federal Appellate Rules. At the time of the decision of the present case by the Court of Appeals for the Ninth Circuit, Rule 81(a)(2) read:

> "In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: . . . habeas corpus. . . ."

If the revision of the rule worked any substantive change in the result which it required in the decision of this case, we think it clear that the revised Rule 81(a)(2), set forth in the text, would control decision in this Court, notwithstanding it first became effective following the Circuit Court's ruling. For it is settled that rules affecting procedural questions of the sort at issue here are applied to cases pending on appeal on the effective date of the new rule. E.g., *Ex parte Collett*, 337 U.S. 55 (1949); *Bruner* v. *United*

This rather obscure language will obviously support any one of a number of constructions differentially hospitable to the use of the Federal Civil Rules to fill the procedural vacuum in the habeas corpus statutes, ranging from the Ninth Circuit's reading—which would generally deny the Rules applicability—to the construction for which we shall contend, which would generally hold the Rules applicable unless there is a good functional reason, apparent in the traditional practice of the writ, for declining to apply them. We shall develop these alternative possible constructions further in Part II *infra*. For the present, our purpose is to discuss the practical consequences of the choice between an approach generally favoring, and one generally disfavoring, applicability of the Civil Rules in habeas proceedings.

The Ninth Circuit's approach is to hold that, when a habeas corpus court is faced with a procedural question that is unresolved by statute, it may utilize the procedures authorized by the Rules "only if it can be shown that,

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States, 343 U.S. 112 (1952); *Georgia* v. *Rachel*, 384 U.S. 780 (1966), *aff'g* 342 F.2d 336, 337 (5th Cir. 1965). It seems to us that the revised language now operative is slightly more favorable for the construction of the rule which we urge, in that the new formula "These rules are applicable . . . to the extent . . ." etc., calls more positively for the application of the Federal Civil Rules in habeas cases than the more tortuous quadruple negatives of the earlier version: "[The Rules] are not applicable otherwise than on appeal except to the extent . . ." etc. However, we must candidly note that the revisers of Rule 81(a)(2) seem to have believed that they were effecting no change in meaning by their verbal reformulation, whose purpose was stated to be to "eliminate inappropriate references to appellate procedure" in the Civil Rules, following the effective date of the new Federal Appellate Rules. See the Explanatory Note to the proposed revision of Rule 81(a)(2), 43 F.R.D. 164 (1968). In any event, our own position in this Court does not turn on exegetic niceties of language under either form of the rule, but rather on broad considerations of policy leading to a result neither compelled nor foreclosed verbally by old or by new Rule 81(a)(2).

prior to September 16, 1938, . . . [the procedure] was actually being used in habeas proceedings, and that such use conformed to the then . . . practice in actions at law or suits in equity." *Wilson* v. *Harris*, 378 F.2d 141, 144. The year 1938 was, of course, the date of first promulgation of the Federal Rules of Civil Procedure, hence the point of reference of the "heretofore" in Rule 81(a)(2). It was also the year of decision of *Johnson* v. *Zerbst*, 304 U.S. 458, the landmark opinion in the evolution of federal habeas corpus from a narrow remedy concerned with "jurisdictional" defects to a broadly available forum for the vindication of federal constitutional rights denied in the criminal trial process.[7] As we have said, prior to this year, trial practice in habeas corpus was rudimentary since trials themselves very seldom were had. As a result, issues arising in habeas cases today relating to discovery, request for admissions, pretrial conferences, summary judgment, consolidation and severance, procedures for and at an evidentiary hearing, findings of fact and conclusions of law by the court, etc., must be resolved—under the Ninth Circuit's view—without the guidance of the Rules.

As a further result, we would suppose, the question is posed: to what body of rules *does* a habeas corpus court look in ruling on a request for discovery, for a pretrial conference, for summary judgment, etc.? Surely there must be some source of law or practice from which principles can be drawn to determine these rulings. For a habeas court, like any other, inevitably applies or makes procedural law however it may act—whether it allows or disallows interrogatories or a deposition, holds or declines to hold a pretrial conference, entertains or refuses to entertain a summary judgment motion. If the statutes of the United States are silent (as they are) and if the

[7] See note 3 *supra*.

Federal Civil Rules do not apply (as the Ninth Circuit says they do not), how is a habeas judge to know what to do? The available answers to this question seem to be two: either he must act as a habeas corpus judge would have acted prior to September 16, 1938; or he must draw from and contribute to the development of a contemporary common law of federal habeas corpus procedure—an evolving canon of regulations and practices governing procedure under the Great Writ.

The Ninth Circuit neither formulated nor expressly answered this latter question, but its holding disallowing the use of interrogatories approved by Judge Harris necessarily contains its answer: a federal habeas corpus court in 1968 is to act, as near as may be, like a federal habeas corpus court prior to 1938. As a consequence, federal habeas corpus practice is to be frozen in its pre-1938 mold. Today's practical problems are to be met with the answer of thirty years ago.

This result would be intolerable in any kind of legal proceeding. It would be aberrant as well as unserviceable, for we know of no sort of proceeding in which there exists a principle, like that embodied in the Ninth Circuit's construction of Rule 81(a)(2), which forbids courts to develop and evolve rules of practice, in matters not governed by statute, responsive to contemporary problems and informed by contemporary thinking and experience. But the result would be peculiarly indefensible in habeas corpus. It would affront the most basic tradition of the writ: its flexibility and growth as a form of procedure "to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints." *Fay* v. *Noia*, 372 U.S. 391, 401-402 (1963). Habeas corpus "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its general purpose—the protection

of individuals against erosion of their right to be free from wrongful restrictions upon their liberty." *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963), quoted in *Peyton* v. *Rowe*, 391 U.S. 54, 66 (1968). Moreover, it would freeze the procedural evolution of the writ at a uniquely inopportune date, 1938, just prior to the major developments which have largely defined the modern-day business of the federal habeas corpus courts and confronted them with their contemporary procedural problems.[8]

The specific issue framed in the present case exemplifies the difficulties in the Ninth Circuit's approach to Rule 81(a)(2). Under that approach, there can be no discovery of any sort in a habeas corpus case. (The opinion below, explicitly disallows depositions on oral examination or on written interrogatories, as well as interrogatories to parties "for general discovery purposes," 378 F.2d at 144, and its reasoning equally forbids inspection of documents and other tangible objects, requests for admissions, pretrial conferences, etc.) Discovery is forbidden notwithstanding the experience of the past thirty years in ordinary civil cases has demonstrated overwhelmingly the extraordinary utility of various discovery devices in litigation which will or may go to a factual hearing. As this Court put it in *Hickman* v. *Taylor*, 329 U.S. 495, 500-501 (1947):

> "The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. . . . The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence

[8] See text and notes at notes 1-4 *supra*.

> or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need to be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial."

In addition to the well-known virtues of discovery found in conventional civil litigation, pre-trial discovery provides special advantages to the parties and to judicial administration in habeas cases. The habeas petitioner is enabled to learn the specific facts supporting his claims quickly and inexpensively. This may spell the difference between whether the claims are established or not, for habeas petitioners are usually poor men, represented, if at all, by appointed counsel who are normally unable to sponsor independent fact-gathering investigations. Given the summary nature of much habeas practice, illegalities known only to government officials can be uncovered solely by pretrial inquiry. Thus, the availability of adequate discovery procedures will enable many petitioners who would otherwise be left with unsubstantiated allegations to demonstrate an unconstitutional detention.

Discovery is, of course, also advantageous to the habeas respondent. It may be used to reveal that a petitioner's claims are wholly spurious or that no triable issues of fact exist, thus avoiding a full evidentiary hearing. This Court has held that disputed factual issues may be determined by the habeas corpus court only after a hearing, *Townsend* v. *Sain,* 372 U.S. 293 (1963), and the question whether there are disputed factual issues often cannot be decided without pretrial investigation. Most habeas corpus petitions are drafted in the first instance by prisoners, not attorneys; prisoners are seldom very precise

pleaders; even if and after counsel is appointed for a habeas petitioner, the lawyer is ordinarily loth to abandon, on his own responsibility, any of the claims of constitutional violation which the petitioner suggested in his initial *pro se* pleading; and these claims, frequently, consist of little more than conclusory generalities framed in the language of a prior judicial opinion that has come to the prisoner's hand. Such allegations may have no factual basis whatever, or they may conceal a factual claim of indisputable merit. That discovery devices are particularly helpful in determining the existence of triable issues of fact has been recognized by Courts of Appeals, *Rodgers* v. *Bennett*, 320 F.2d 83, 86 (8th Cir. 1963); *Copenhaver* v. *Bennett*, 355 F.2d 417, 421-422 (8th Cir. 1966), including the Ninth Circuit itself in federal-prisoner cases under 28 U.S.C. §2255, *Dodd* v. *United States*, 321 F.2d 240, 246 (9th Cir. 1963); *Russell* v. *United States*, 321 F.2d 533 (9th Cir. 1963). And, even where an evidentiary hearing is found to be unavoidable, the respondent will often be able to make profitable use of discovery to anticipate and meet all of the claims which a petitioner may assert at the hearing—sometimes without prior notice[9] —against the validity of his detention.

The importance of these several functions of discovery to the efficient administration of justice in habeas corpus matters is underlined by the circumstance that doctrines such as *res judicata* and collateral estoppel which are employed to give finality to even imperfect adjudications in ordinary civil actions are—for good reason—inapplicable or relaxed in habeas cases. *Sanders* v. *United States*,

[9] In accordance with the spirit of *Sanders* v. *United States*, 373 U.S. 1 (1963), many federal district judges quite properly permit —and some compel—a prisoner to raise at a federal habeas corpus hearing any and all claims he may then have, whether or not previously framed by his pleadings.

373 U.S. 1 (1963). In consequence, a full and fair, adequately informed and adequately prepared initial factual hearing on a habeas corpus petition raising a legally colorable issue is indispensable to the avoidance of successive repeater petitions, requiring renewed legal and factual consideration by the court, which are no less a burden to the judicial system whether they be justified attempts by a prisoner to remedy the defects in prior habeas corpus hearings or mere frivolous obstinacy in pressing a previously, fully and fairly heard and rejected contention. Effective use of discovery devices would do much to eliminate or at least to expedite the handling of these frequent repeater petitions that cause unnecessary waste and irritation within the federal system. First, as suggested above, discovery would allow frivolous claims to be detected and dealt with in summary fashion, while, at the same time, helping to assure the fullest possible hearing for any colorably meritorious claim. Second, by making the court and the parties aware of not only the facts now known to the prisoner bearing on his specific claims initially raised, but all other available facts bearing on those claims, and also factual matters supporting other viable related claims which the prisoner may have at his disposal and later raise, discovery would provide a means for considering all such constitutional claims at the earliest possible time—for providing "meaningful factual hearings on alleged constitutional deprivations . . . before memories and records grow stale," *Peyton v. Rowe*, 391 U.S. 54, 65 (1968)—and thereby for effectively limiting the number of successive habeas petitions which need receive plenary hearing. This Court has already indicated the desirability of employing all procedures available to a habeas corpus court to expedite the hearing of every meritorious claim the petitioner may have.

> "[T]he imaginative handling of a prisoner's first motion would in general do much to anticipate and avoid the problem of a hearing on a second or successive motion. The judge is not required to limit his decision on the first motion to the grounds narrowly alleged, or to deny the motion out of hand because the allegations are vague, conclusional, or inartistically expressed. *He is free to adopt any appropriate means for inquiring into the legality of the prisoner's detention in order to ascertain all possible grounds upon which the prisoner might claim to be entitled to relief.* Certainly such an inquiry should be made if the judge grants a hearing on the first motion and allows the prisoner to be present." *Sanders* v. *United States,* 373 U.S. 1, 22-23 (1963). (Emphasis added.)

It is no accident, therefore, that the use of discovery in habeas proceedings has been urged by respected authorities, on the ground that it would provide "the most promising possibility for saving time and expense and for avoiding the tension caused by full-dress hearings." Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility,* 75 YALE L.J. 895, 934 (1966). See AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO POST-CONVICTION REMEDIES, Tentative Draft, January 1967, p. 70 (Professor Curtis Reitz, Reporter); Carter, *Pre-Trial Suggestions for Section 2255 Cases Under Title 28, United States Code,* 32 F.R.D. 391 (1963); Breitenstein, *Remarks on Recent Post Conviction Decisions,* 33 F.R.D. 434, 444-445 (1963); Becker, *Collateral Post-Conviction Review of State and Federal Criminal Judgments on Habeas Corpus and on Section 2255 Motions—View of a District Judge,* 33 F.R.D.

452, 492 (1963); *Note, Civil Discovery in Habeas Corpus*, 67 COLUM. L. REV. 1296 (1967). Not only does the decision below deny the federal courts every discovery device, without exception, which has been thought or proved by experience to have the promise thus described, but also virtually every other modern procedural device favorable to the expeditious, fair and efficient handling of cases appearing to present litigable factual controversies.

We therefore respectfully suggest that the Ninth Circuit's ruling is so impracticable, so unworkable, so intolerably unresponsive to the needs of the federal habeas corpus jurisdiction today, that it should not be permitted to stand unless it is compelled by the text of Rule 81(a)(2)—as we shall show in the next section of this brief that it is not. There remains to consider here, however, whether the Court of Appeals' approach to Rule 81(a)(2) is not supportable in some part, if not in whole.

As we have pointed out, the decision below involves two distinct holdings, one express and the other tacit. The Ninth Circuit held expressly that Rule 81(a)(2) did not make the Federal Civil Rules governing discovery applicable in habeas cases. It necessarily held *sub silentio* also that the effect of the Rule was to disempower federal habeas judges, in the exercise of their ordinary powers to conduct litigation before them, to adopt procedures akin to those provided by the Civil Rules—that it stopped the clock of procedural habeas corpus evolution in 1938 and disallowed subsequent common-law evolution taking guidance, where appropriate, from procedures used in civil matters under the Rules.

The first of the Ninth Circuit's holdings, of course, does not logically entail the second; for it might be held at once that the Federal Civil Rules, by force of Rule 81(a)(2),

do not apply in habeas corpus, and yet that habeas corpus courts have what petitioner Harris called in his petition for *certiorari* the "inherent powers" to develop and evolve fitting procedural incidents of the Great Writ.[10] As we have indicated earlier in this section, the issue of "inherent powers" seems to us approachable rather as a question of inherent necessity, since a habeas corpus judge, like any other, must make rulings on matters before him and thereby must make law, whatever its content. The question, we think, is what sources and principles of law he should look to in those rulings. If our view is accepted that the answer cannot lie in pre-1938 habeas corpus practice, two possibilities remain: the Federal Civil Rules, or an evolving, judge-made, common-law body of habeas corpus procedures. Although reference to *either* of these sources would sustain Chief Judge Harris' ruling herein and require reversal of the Ninth Circuit's judgment, choice between the two sources is vitally important and, in our view, should be made by the Court in deciding this case. We therefore conclude this section with a consideration of the relative merits of the two.

Surely, a holding that the Civil Rules do not generally apply in habeas corpus (by reason of the construction of Rule 81(a)(2) given by the Ninth Circuit or one similarly restrictive), but that the habeas corpus courts have plenary power to adopt fit forms of procedure on an *ad hoc,* common-law basis, presents none of the unbearable inconveniences described above as attending the freezing of habeas corpus procedures in the year 1938. Such a holding, however, seems to us less desirable, for several reasons, than a holding that the Civil Rules generally do apply—or, to restate our exact submission, that they apply in the absence of specific statutory regulation and

[10] See Petition, p. 8.

unless some functional reason manifest in the traditional evolution of habeas corpus practice requires that they not be applied. These reasons are entirely practical, and may be briefly summarized:

(1) In general, it is preferable that procedural matters be regulated by a specific, published, readily available code of rules, than that they be governed by unwritten practice or by a corpus of common-law precedents scattered through the Federal Reporters. This is so because codification simplifies the work both of judges and of lawyers; written rules are more quickly and handily available than the common law (even where the common law does speak to the specific issue facing the judge or lawyer, as often it does not); and, even where a published rule has been glossed by judicial construction, legal research is facilitated if the pertinent jurisprudence begins with an accessible text. It must be remembered that procedural questions of the sort involved in this case only infrequently become the subject of appellate consideration, hence of published opinions; and, certainly, procedural regularity and efficiency alike are served if proceedings are governed by written regulations rather than by unwritten practice. These considerations are particularly compelling in habeas corpus matters, for two additional reasons. First, many habeas cases are still processed without the appointment of counsel, and a prisoner acting *pro se* is far more likely to have accessible and comprehensible to him the text of the Federal Rules than either a knowledge of unwritten practice or even the case reports of pertinent common-law judicial decisions. Second, when counsel is appointed to represent an indigent prisoner (and most federal habeas petitioners are indigent), the lawyer is likely to be a general practitioner not particularly experienced in the specialized practice or case law

of habeas corpus. Acting generally without compensation, he has limited resources, and is more likely to be effective with easy-to-find procedures—particularly the procedures of the Federal Rules, with which he is familiar in ordinary civil litigation—than with procedures defined by a less visible body of practices and judicial decisions.

(2) This last consideration—the familiarity of the federal rules to lawyers and judges—has broader implications as well. The point, simply, is that it is easier for a system to operate with one body of rules than with two, and that this added ease is itself a persuasive reason against multiplying differing codes of rules for different proceedings unless there is some countervailing good reason to do so.

(3) In general, there is no good reason not to use the Federal Civil Rules in habeas cases. The Rules are the product of very considerable experience and thought. They are the subject of continuing study by a concerned Rules Committee, attentive to the common problems of factual litigation and informed respecting alternative procedural devices for coping with those problems. They are periodically revised to reflect the most enlightened, modern and practical procedural thinking of the times. The benefits of the experience and thought that attend the formulation of the Rules should not be denied a habeas corpus forum unless—again—some specific reason appears why habeas corpus is different in its needs and circumstances from other civil proceedings.

(4) Our formulation for the applicability of the Federal Rules in habeas cases would take account of any such specific reasons where, and to the extent that, they exist. We suggest that Rule 81(a)(2), making the Rules apply

to habeas corpus "to the extent that the practice in [habeas] . . . has heretofore conformed to the practice in civil actions" be read to mean that the Rules govern procedure in habeas corpus unless the traditional practices in writ proceedings manifest a peculiar characteristic of such proceedings which has caused the development of a distinct body of procedures traditionally variant from the proceedings in civil cases generally. Our own experience —(counsel for *amici* have maintained a very considerable amount of litigation both in habeas corpus and in civil actions in the federal courts)—is that habeas resembles other civil actions, in its needs and circumstances, in more particulars than it differs from them. But where there do exist differences, they have found expression in the development of identifiable specialized habeas procedures —such as the rule to show cause, first devised by judicial practice and later codified in statute—which respond to them. In the absence of a showing that such procedures have developed, which have not "conformed to the practice in civil actions," and of course in the absence of any specific statutory regulation of a procedural point, we think that there can be no basis for the contention that habeas is a solecism so unlike ordinary civil litigation that application of the Rules governing most civil cases (including such varying cases as diversity actions for damages growing out of an automobile collision, and injunctive proceedings to restrain the enforcement of an unconstitutional state statute) would be dysfunctional in habeas.

(5) Finally, the Federal Civil Rules, where they apply, do not usually dictate an inflexible, iron-clad, unitary method of proceeding. They ordinarily leave considerable discretion for particularistic administration by the district judge, in light of the over-all nature of the case

before him and the general command of the Rules that they be construed "to secure the just, speedy, and inexpensive determination of every action." FED. RULE CIV. PRO. 1. Here again there is ample room for adjustment of particular rules where the individual characteristics of a habeas case require. On the other hand, the Rules do contain provisions of sufficient specificity to guide the orderly conduct of a case routinely and efficiently unless judicial action is requested and taken to make some adjustment of them. It is, for example, impossible to fault the holding of the Court of Appeals for the Fifth Circuit in *Fortner* v. *Balkcom,* 380 F.2d 816 (5th Cir. 1967), that interrogatories in a habeas matter could not properly be propounded without the adequate notice required by Rules 5(b) and 31. This requirement might have been waived, for good cause shown, on application to the court; but in the absence of such an application, there seems no reason why the notice provisions applicable in a habeas case should differ from those in any other case, and still less reason for a general holding that the Civil Rules are inapplicable, with the result that habeas courts must invent case-by-case the appropriate forms and times of notice. Least of all does it appear to us that it should be said, as the Ninth Circuit below has said, that interrogatories are entirely unavailable in habeas corpus, when every consideration of experience urges that in habeas identically with other civil actions which may go to evidentiary hearing, the hearing is more fairly and efficiently conducted with the benefit of pretrial discovery proceedings.

II.

Rule 81(a)(2) Makes the Federal Rules of Civil Procedure Applicable in Habeas Corpus Except When a Statute Governs or When a Distinct, Traditional Practice of Habeas Procedure Variant From the Procedure in Ordinary Civil Actions Manifests Unique Characteristics of the Writ That Make the Rules Unserviceable. In Any Event, Federal Trial Courts Are Empowered to Adopt the Procedures Described in the Rules as a Consequence of Their Undeniable Power to Formulate Adequate Procedures for the Administration of the Habeas Corpus Jurisdiction.

In the preceding section of this brief, we have attempted to identify the considerations which, as a practical and normative matter, affect the question whether the Federal Civil Rules ought or ought not generally to be applied in habeas corpus cases. We have concluded that the decision of the Ninth Circuit, denying applicability of the Rules and incidentally freezing habeas corpus procedure as of 1938 ought to be avoided unless no other construction of Rule 81(a)(2) is supportable. We have considered two alternative positions available if the Ninth Circuit's is rejected: one which would hold the Rules inapplicable but leave the federal habeas courts free to develop a common-law body of contemporary habeas corpus procedures; and another which would generally apply the Federal Rules in the absence of good reason not to apply them. As between these two positions, we have explained the reasons which we think favor the latter. There remains to be considered whether the text of Rule 81(a)(2) or other non-normative concerns require the Ninth Circuit's interpretation or preclude the lawful adoption of the one which we espouse.

The text of the Rule, set forth at p. 8 *supra*, calls for the application of the Federal Civil Rules "to the extent

that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions." We take it that no issue arises in the present case respecting the first of these two conditions. Plainly no federal statute describes habeas corpus practice in the matter of discovery, and the Ninth Circuit does not suggest the existence of any such statute.[11] The case turns upon the meaning of the second requirement: that practice in habeas matters have "heretofore conformed to the practice in civil actions."

We submit that this language has no such plain meaning as would preclude consideration of the strong reasons set forth in Part I, *supra*, for rejecting the Ninth Circuit's interpretation of Rule 81(a)(2).[12] The Ninth Circuit's requirement that the requisite conformity be affirmatively shown by one who seeks to invoke one of the Federal Civil Rules by demonstrating that the procedure authorized under the Rule "was actually being used in habeas proceedings, and that such use conformed to the then . . . practice in actions at law or suits in equity," 378 F.2d at 144, is a verbally possible construction, but surely not the only possible construction. Indeed, it has some logical difficulties as applied to questions like that posed in the present case, where what is at issue is the availability of a form of procedure, rather than the regulation of details involved in administering a procedure. For if the procedure cannot be shown to have been in use prior to

[11] In a matter where a direct conflict existed between the Rules and a federal statute, this Court of course did not hesitate to preclude utilization of the Rule. In *Holiday* v. *Johnston*, 313 U.S. 342 (1941), it was held that since Section 761, now 28 U.S.C. §2243, specifically required that the judge decide the facts of a case, his role could not be superseded by a master, as authorized in civil proceedings by Rule 53.

[12] We have also found nothing compelling, or even instructive, in the history of Rule 81(a)(2), its successive Advisory Committee Notes, or other interpretive materials.

1938, the Rules do not make it available; whereas if it can be shown to have been in use prior to 1938, it would continue to be available on the effective date of the Rules with or without their sanction. Rule 81(a)(2), then, in this situation, makes the Rules either inapplicable or superfluous. The effect of the Rules in ordinary civil actions was to be in some instances major innovation (as in the discovery area); in other instances, mere codification or slight change of existing practice. In habeas corpus matters, under the Ninth Circuit's construction the Rules could be given only the latter, minor effects. And it is not obvious why the latter effects would not have been given to the Rules in matters wherein habeas practice had "conformed" to practice in law and equity, in this sense of conformity, even if Rule 81(a)(2) had taken the simpler approach of excluding habeas corpus entirely from the direct application of the Rules. See cases cited in note 20 *infra*.

In any event, it does not appear to us that the Ninth Circuit's reading of the text of Rule 81(a)(2) is compelling as a verbal matter. Our own suggested construction, making the Rules applicable unless established pre-1938 traditions had developed distinct and established habeas corpus procedures different from those in ordinary civil actions, is surely not foreclosed linguistically. Practice in habeas corpus conformed to practice in civil actions if, in general, a habeas corpus judge would look to the same sources of procedural law as would a judge in a civil action when an identical issue arose; and this was the case unless habeas had developed its own specific and distinctive procedures. "Practice" is used here in its natural and general sense as designating the method by which specific procedural questions are decided rather than in the Ninth Circuit's meaning of the specific and individual procedural rulings themselves, a meaning which has the difficulty, at the very least, of obscurity when specific rul-

ings were not in fact being made or their purport preserved. And, of course, the Ninth Circuit's construction entails the further difficulty that habeas corpus courts which would have decided a procedural question conformably to the practice at law had the occasion arisen prior to September 16, 1938 were precluded from doing the same when the question first arose after September 16—a result which the draftsmen of Rule 81 could hardly have intended even if logic alone, without concern for practicality, governed their thinking.[13]

Unsurprisingly, therefore, the lower federal courts have, for the most part, taken our approach rather than that of the Ninth Circuit, to construction and application of Rule 81(a)(2). When dealing with procedural questions that had not been governed, prior to 1938, by a recognizably distinctive set of practices plainly developed and demarked in the habeas corpus case law, the Courts of Appeals and District Courts have relatively routinely applied the Federal Civil Rules in habeas proceedings.[14] These courts have generally done so without inquiring to discover—as

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[13] We do not ignore that the interpretation which we place on Rule 81(a)(2) would govern the applicability of the Federal Civil Rules not only to habeas corpus, but also to quo warranto, forfeiture, etc. We see no difficulties in the application to those proceedings of our principle that the Federal Rules should govern in the absence of an established procedure distinctive in the practices of each proceeding, that differs from the usages of ordinary civil actions.

[14] See, for example, *United States ex rel. Tillery* v. *Cavell*, 294 F.2d 12 (3d Cir. 1961) (Rule 60(a)); *McGarrah* v. *Dutton*, 381 F.2d 161 (5th Cir. 1967) (Rule 26(d)(3), (4)); *Bowdidge* v. *Lehman*, 252 F.2d 366 (6th Cir. 1958) (Rule 56); *Abel* v. *Tinsley*, 338 F.2d 514 (10th Cir. 1964) (Rule 60(b)); *United States ex rel. Bruno* v. *Herold*, 39 F.R.D. 570 (N.D.N.Y. 1966), *aff'd on rehearing*, 271 F. Supp. 491 (N.D.N.Y. 1967) (Rule 60(b)); *Bowen* v. *Boles*, 258 F. Supp. 111 (N.D.W. Va. 1966) (Rule 6(b)(2)); *In re McShane's Petition*, 235 F. Supp. 262 (N.D. Miss. 1964) (Rule 56); *Lyles* v. *Beto*, 32 F.R.D. 248 (S.D. Tex. 1963), *subsequent history in* 329 F.2d 332 (5th Cir. 1964) (Rule 45(e)(1)); *Hamilton* v. *Hunter*, 65 F. Supp. 319 (D. Kan. 1946) (Rule 15(b)). But see note 20 *infra*.

the decision below would require—whether the particular Federal Rules procedure which they held applicable had been established in the pre-1938 habeas corpus practice by specific and affirmative usage conforming to the usage in law or equity. Rather, in the absence of a distinct, established habeas corpus usage controlling the point and differing from its resolution in legal and equitable actions, the courts simply conclude that "Habeas corpus is a civil proceeding governed by the Federal Rules of Civil Procedure, Rule 1, Rule 81(a)(2)," [15] and they apply the appropriate Federal Rule.

Thus, there has been widespread use of the discovery-deposition procedures authorized by Federal Civil Rules 26 through 33 in habeas corpus matters. See *United States ex rel. Seals* v. *Wiman*, 304 F.2d 53 (5th Cir. 1962) (Rule 36, requests for admissions); *Molignaro* v. *Dutton*, 373 F.2d 729 (5th Cir. 1967) (Rule 31, depositions on written interrogatories); *Fortner* v. *Balkcom*, 380 F.2d 816 (5th Cir. 1967) (same); *Rodgers* v. *Bennett*, 320 F.2d 83, 86 (8th Cir. 1963) (Federal Civil Rules governing discovery generally); *Knowles* v. *Gladden*, 254 F. Supp. 643 (D. Ore. 1965), *subsequent history in* 378 F.2d 761 (9th Cir. 1967) (Rules 26 and 30, depositions). These reported decisions are merely the top of the iceberg. Counsel for *amici* have had an extended practice in federal habeas corpus matters in dozens of federal districts, and know from experience that many district courts routinely employ the Federal Civil discovery rules in such matters.[16] That practice is

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[15] *Bowdidge* v. *Lehman*, 252 F.2d 366, 368 (6th Cir. 1958) (Rule 56). See, e.g., *United States ex rel. Seals* v. *Wiman*, 304 F.2d 53, 64 (5th Cir. 1962) (Rule 36).

[16] "It has been reported that, in Texas, the full panoply of discovery techniques of the Federal Rules of Civil Procedure is available in federal habeas corpus proceedings brought by state prisoners." AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO POST-CONVICTION REMEDIES, Tentative Draft, January 1967, p. 70 (Professor Curtis Reitz, Reporter).

consonant with the expressly announced expectation of this Court in *Brown* v. *Allen*, 344 U.S. 443, 464-465 n. 19 (1953) (emphasis added):

> "Other sections strengthen the ability of the court hearing the application fully to advise itself concerning prior hearings of the same issues for the applicant. 28 U.S.C. § 2245 allows a certificate as to certain facts; § 2246 provides for depositions and affidavits. Section 2247 makes liberal provision for the use of records of former proceedings in evidence. See also §§ 2248-2254, inclusive. *Of course, the other usual methods of completing the record in civil cases, such as subpoena duces tecum and discovery, are generally available to the applicant and respondent.*"

The significance of the experience of these lower federal courts, whose practice we urge this Court to approve, is two-fold. First, we believe that it supports our contention that the Ninth Circuit reading of Rule 81(a)(2) is not compelled by the plain meaning of the Rule. We would hardly suppose that so many federal judges had overlooked a plain meaning that the court below somehow perceived. Second, the pervasive use of discovery practice under the Federal Civil Rules in habeas matters in many districts demonstrates the validity of our contention that these rules are fully compatible with the nature and functions of habeas corpus. Not only have the rules been freely and widely used without observed dislocation; they have proved to be valuable and serviceable tools for the administration of the habeas corpus jurisdiction. Accordingly, we submit it is apparent that nothing in the character of habeas corpus is so alien to ordinary civil litigation as to make use of the civil discovery rules inappropriate. This conclusion both supports our construc-

tion of Rule 81(a)(2) and establishes that under it Chief Judge Harris' employment of Rule 33 herein to authorize discovery interrogatories in a habeas corpus proceeding is altogether lawful and proper.

If we are wrong in this submission, however, and Rule 81(a)(2) is not to be read as making the Federal Civil Rules governing discovery directly applicable in habeas cases, we think it nevertheless quite clear that Judge Harris was lawfully empowered to adopt and employ the procedure described by Civil Rule 33, in the exercise of his necessary and inherent power to regulate proceedings before him and to devise appropriate and praticable procedures in habeas corpus matters. In the closing pages of Part I, *supra,* we have stated why we believe it would be preferable for this Court to hold the civil discovery rules directly applicable to habeas proceedings, rather than to hold that—while the rules do not apply of their own force—a district judge has discretion to adopt appropriate procedures described by them, in his administration of the habeas corpus jurisdiction. If, however, Rule 81(a)(2) is construed inhospitably to the application of the Civil Rules, with the result that a choice must be made between allowing discretion to the district courts to devise a fluent and evolving common law of habeas corpus procedure that refers to the Rules for guidance in appropriate cases, or, on the other hand, ossifying habeas corpus procedure in the forms prevailing before 1938 as did the Ninth Circuit below, the stunting and destructive consequences of the Ninth Circuit's approach make the recognition of district court discretion plainly the only tolerable course. As for the question whether there exists a legal source of such discretion, the answer is incontrovertible.

This Court has time and again recognized the flexibility of the Great Writ, e.g., *Jones* v. *Cunningham,* 371 U.S.

236, 243 (1963); *Townsend* v. *Sain*, 372 U.S. 293, 311-319 (1963); *Peyton* v. *Rowe*, 391 U.S. 54, 65-67 (1968), its capacity for growth to respond to the developing demands upon its function "to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints," *Fay* v. *Noia*, 372 U.S. 391, 401-402 (1963). That capacity for growth has been amply demonstrated in both the English and the American experience of centuries,[17] and again, with striking recency, in the history of habeas corpus in this Court during the past few decades.[18] The Court has also recognized that the traditions of the writ call for broad discretion of trial judges in its administration, to the end that the writ "not lose its effectiveness in a procedural morass," *Price* v. *Johnston*, 334 U.S. 266, 269 (1948). See *Darr* v. *Burford*, 339 U.S. 200, 210 (1950); *Frisbie* v. *Collins*, 342 U.S. 519, 520-522 (1952); *Fay* v. *Noia*, 372 U.S. 391, 438-439 (1963); *Townsend* v. *Sain*, 372 U.S. 293, 313, 318 (1963); *Sanders*

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[17] Concerning the earliest emergence of the writ from a mere form of body process into a guarantor of individual liberty, see Jenks, *The Story of the Habeas Corpus*, 18 L. Q. Rev. 64, 67-68 (1902); Fox, *Process of Imprisonment at Common Law*, 39 L. Q. Rev. 46 (1923). The later English history of the development of *habeas corpus ad subjiciendum* as the cardinal safeguard of freedom is in large measure the history of the writ's disentanglement from fettering procedures which impeded its effectiveness. See 3 Blackstone, Commentaries 134-138 (6th ed., Dublin 1775); 9 Holdsworth, A History of English Law 111-119 (1926); Chaffee, How Human Rights Got Into the Constitution 51-64 (1952). The American experience is exhaustively described in the opinions in *Fay* v. *Noia*, 372 U.S. 391 (1963), and *Townsend* v. *Sain*, 372 U.S. 293 (1963), and in, e.g., Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 Utah L. Rev. 423 (1961); Reitz, *Federal Habeas Corpus: Post-conviction Remedy for State Prisoners*, 108 U. Pa. L. Rev. 461 (1960); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 Harv. L. Rev. 1315 (1961); *Note, The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 Harv. L. Rev. 657 (1948).

[18] See notes 2, 3, 4 *supra*.

v. *United States,* 373 U.S. 1, 18-19 (1963). Plainly, the teaching of the traditions reflected in these opinions is that the federal courts, in the exercise of the jurisdiction conferred by 28 U.S.C. §§2241 *et seq.,* have exceedingly broad and motile powers to fashion procedural devices needful and fitting for administration of proceedings in habeas corpus, in the service of its historic office as "the great and efficacious writ, in all manners of illegal confinement." [19] Explicit statutory recognition of the principle, indeed, is found in 28 U.S.C. §2243 (1964), which empowers habeas corpus judges to "summarily hear and determine the facts, and dispose of the matter as law and justice require." Both this Court and the lower courts have made frequent, free and liberal use of the power. E.g., *Ex parte Clark,* 100 U.S. 399 (1879) (issuance by a single Justice of the writ returnable before the Court; admission of the petitioner to bail by the single Justice); *Ex parte Mitsuye Ende,* 323 U.S. 285 (1944) (retention of jurisdiction notwithstanding transfer of custody of the petitioner out of the jurisdiction); *In re Burwell,* 350 U.S. 521 (1956) (issuance of certificate of probable cause by a Court of Appeals without statutory authority); *Johnston* v. *Marsh,* 227 F.2d 528 (3d Cir. 1955) (admission of habeas petitioner to bail); *Sisquoc Ranch Co.* v. *Roth,* 153 F.2d 437 (9th Cir. 1946) (extension of "next friend" practice); *Thomas* v. *Duffy,* 191 F.2d 360 (Denman, C.J., 1951), approved in *Thomas* v. *Teets,* 205 F.2d 236 (9th Cir. 1953) (stay of execution pending exhaustion of state remedies); *Adderly* v. *Wainwright,* 272 F. Supp. 530 (M.D. Fla. 1967) (recognition of power to entertain class action challenging constitutionality of death penalty on behalf of all condemned men in State; order allowing counsel to interview all condemned men to determine

[19] 3 BLACKSTONE, COMMENTARIES 131 (6th ed., Dublin 1775).

if class action is practicably appropriate); *Hill* v. *Nelson*, 272 F. Supp. 790 (N.D. Cal. 1967) (order prescribing detailed procedures for the protection of condemned men in similar case begun as class action but found not practicably to be entertained as such); *Hill* v. *Nelson*, N.D. Cal., No. 47318, unreported order of Chief Judge Harris, February 5, 1968 (consolidating cases challenging constitutionality of death penalty and providing for centralized and continuing administration by a single district judge, for protection of the condemned men).[20]

A particularly significant instance, for present purposes, of the traditional flexibility and procedural adaptability of habeas corpus process is one that has become a classic: the Nineteenth Century judicial creation of the rule to show cause. This procedure, originally devised and long practiced by the federal habeas corpus courts without Congressional authority,[21] was found commonly service-

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[20] Significantly, those courts which have thought that various sections of the Federal Civil Rules were not directly applicable in habeas corpus proceedings have nevertheless remarked that their inherent power would allow them to apply such rules by analogy. *United States ex rel. Goldsby* v. *Harpole*, 249 F.2d 417, 420 n. 3 (5th Cir. 1957); *United States ex rel. Jelic* v. *District Director*, 106 F.2d 14, 20 (1939). While in *Sullivan* v. *United States*, 198 F. Supp. 624 (S.D.N.Y. 1961) (a federal prisoner case under §2255, which also discusses habeas corpus as though the remedies were convertible for this purpose), the district court refused to allow direct application of the interrogatory provisions of the Federal Rules, it specified that it had previously allowed the discovery of documents under Rule 34 in the exercise of its inherent power. The district court in *Hardison* v. *Dunbar*, 256 F. Supp. 412 (N.D. Cal. 1966), followed an especially flexible approach to the use of the Federal Rules, discussing not only the applicability of Rules 15 and 59(b) by analogy, but also modification of these rules in view of the unique needs of habeas cases.

[21] See *Ex parte Watkins*, 3 Pet. 193, 196 (1830). The procedure is described in *Ex parte Collins*, 154 Fed. 980, 982-983 (C.C.N.D. Cal. 1907), *aff'd* 214 U.S. 113 (1909); *Dorsey* v. *Gill*, 148 F.2d 857, 865-872 (D.C. Cir. 1945); *Longsdorf, Habeas Corpus—A Protean Writ and Remedy*, 8 F.R.D. 179, 187-188 (1949).

able, and was finally approved by statute in 1948.[22] Functionally viewed, it was the last Century's counterpart of modern discovery devices, performing for a habeas corpus jurisdiction concerned principally with legal issues what such procedures as depositions and interrogatories perform for a jurisdiction concerned principally with factual ones.

So it is consistent, we submit, with the oldest and most firmly established traditions of the Great Writ, to recognize in the federal district courts ample originative and administrative power to order discovery on an *ad hoc* basis in an appropriate habeas corpus case, modeling their procedures on the familiar patterns of the Federal Civil Rules, as did Judge Harris here. Whether the present case was indeed an appropriate one—as we think but need not argue it was—is a question for Judge Harris' discretion. The Ninth Circuit did not purport to review the exercise of that discretion, as indeed it could not properly do on this record, within the fitting scope of a mandamus. Rather, it held that Judge Harris lacked power to order compliance with discovery interrogatories. In this it erred, and its judgment should be reversed.

CONCLUSION

The unique importance of habeas corpus in our constitutional scheme is emphasized by the command of Art. 1, §9, c. 2, that "The Privilege of the Writ of Habeas Corpus shall not be suspended. . . ." The relationship between procedural restrictions which hamper the effective enforcement of the writ and its suspension was first noted by Chief Justice Marshall in *Ex parte Bollman*, 4 Cranch 75, 95 (1807): "for if the means be not in exist-

[22] 28 U.S.C. §2243 (1964).

ence, the privilege itself would be lost, although no law for its suspension should be enacted." The relationship has been noted again as recently as *Sanders* v. *United States,* 373 U.S. 1 (1963). And this Court has repeatedly expressed the concept that "'"there is no higher duty than to maintain . . . [the writ of habeas corpus] unimpaired," *Bowen* v. *Johnston,* 306 U.S. 19, 26 (1939), and unsuspended . . .' *Smith* v. *Bennett,* 365 U.S. 708, 713 (1961)," *Fay* v. *Noia,* 372 U.S. 391, 400 (1963).

To effectuate the purpose of the writ of habeas corpus —the vindication of the right to freedom from restraints in violation of fundamental law—the federal habeas courts must have the use of those procedural tools that are necessary and proper to maintain effective inquiry into the legality of a petitioner's detention. Because both the substantive constitutional guarantees that may make a detention unlawful and the corresponding scope of the writ of habeas corpus have expanded greatly beyond their origins —and most particularly within the past thirty years— evidentiary hearings are today essential to the performance of the constitutional office of the writ. In turn, an adequate battery of pretrial devices for the effective discovery, preparation and presentation of factual matters at the evidentiary hearing is the indispensable precondition of its effectiveness. Deprivation of effective hearing on a claim works the substantial denial of the claim and affronts the constitutional guarantee that is its basis. E.g., *Commonwealth ex rel. Herman* v. *Claudy,* 350 U.S. 116, 123 (1956); *Coleman* v. *Alabama,* 377 U.S. 129, 133 (1964). These considerations add a grave concern of constitutional dimension to the interests of practicality and efficient judicial administration (Part I of this Brief) that the decision of the Ninth Circuit threatens to impair.

As shown in Part II of the Brief, a practical reading of Federal Civil Rule 81(a)(2) is available which avoids the twin dangers of leaving federal habeas corpus courts unprovided with the essential resources for their vital task, and of leaving federal habeas corpus petitioners an intolerably restricted form of procedure for the vindication of their right to liberty guaranteed by the Suspension Clause. Such a reading should be given the Rule by this Court. Rule 81(a)(2) should be interpreted as making the modern procedures of the Federal Civil Rules fully and directly applicable in habeas corpus proceedings except where an aspect of habeas practice is regulated by statute or where distinctive traditional procedures unique to proceedings under the writ and differing from those in ordinary civil actions have emerged with demonstrable clarity. For these reasons, the judgment below should be reversed.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL MELTSNER
JACK HIMMELSTEIN
10 Columbus Circle
New York, New York 10019

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pa. 19104

Attorneys for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent